IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs May 25, 2007

DEDRA F. JONES, INDIVIDUALLY AND ON BEHALF OF HER DAUGHTER, AMANDA K. JONES-ERVIN, AND DAUGHTER, SIERRA C. CREW, AND RUSSELL J. URBAN, INDIVIDUALLY AND ON BEHALF OF HIS SON, CHRISTOPHER C. URBAN

v.

THE MARLOW FAMILY LIMITED PARTNERSHIP

AND

MARY ANN MARLOW

CRYSTAL T. UDOVICH

v.

THE MARLOW FAMILY LIMITED PARTNERSHIP

AND

MARY ANN MARLOW

An Appeal from the Circuit Court for Campbell County
Nos. 12205 & 12309 John McAfee, Judge

No. E2006-02677-COA-R3-CV - FILED JULY 27, 2007

This is a tragic case arising out of the accidental shooting of a child. The plaintiffs, three minors and one adult, were at the home of the individual defendant to celebrate the birthday of an eleven-year-old child. A minor who was at the home obtained a loaded gun from the defendant's gun cabinet. The gun accidentally discharged, killing another child in the home. The plaintiffs filed this lawsuit, alleging that the defendants' negligent or reckless conduct caused emotional distress and psychological harm to the plaintiffs. The defendants later filed a motion to dismiss or for summary judgment as to the plaintiffs' claims of negligent and reckless infliction of emotional distress and as to their punitive damages claim. This motion was granted, with the consent of the plaintiffs. Subsequently, the defendants filed a motion to dismiss the remainder of the lawsuit, arguing that the plaintiffs had no viable claims for recovery other than those that had already been dismissed on summary judgment. The trial court agreed and dismissed the action. The plaintiffs now appeal. The plaintiffs argue that, despite the trial court's dismissal of their claims for negligent infliction of emotional distress, there remained for adjudication claims of ordinary negligence which resulted in

emotional injuries. We affirm the dismissal of the complaint as a whole, concluding that all of the plaintiffs' claims were adjudicated.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court is Affirmed

HOLLY M. KIRBY, J., delivered the opinion of the Court, in which W. FRANK CRAWFORD, P.J., W.S., and ALAN E. HIGHERS, J., joined.

Larry C. Vaughn, Knoxville, Tennessee, for the appellants, Dedra F. Jones, individually and on behalf of her daughter, Amanda K. Jones-Ervin, and daughter, Sierra C. Crew; Russell J. Urban, individually and on behalf of his son, Christopher C. Urban; and Crystal T. Udovich.

Robert W. Knolton, Oak Ridge, Tennessee, for the appellees, The Marlow Family Limited Partnership and Mary Ann Marlow.

OPINION

Plaintiff/Appellant Dedra F. Jones ("Jones") was to host a birthday celebration in honor of her daughter, Sierra C. Crew (d.o.b. 9/28/91), who had just turned eleven years old. The party was to be at the home of Jones's employer, Defendant/Appellee Mary Ann Marlow ("Marlow"). Marlow was significantly disabled and required substantial help to care for her daily needs. Jones was serving as Marlow's temporary aide while Marlow's regular aide was on vacation. Jones and Marlow had met only four days prior to the incident that is the subject of this appeal.

On September 29, 2002, several children came to Marlow's home for Sierra's birthday celebration. The attendees included Jones's other children, Amanda K. Jones-Ervin (d.o.b. 9/2/88) and Mariano G. Guardino, III (d.o.b. 8/19/85). Jones's son Mariano ("Marty") is a special needs child who, at that time, functioned intellectually at the level of a five- or six-year-old child. The party attendees also included the son of Plaintiff/Appellant Russell J. Urban, Christopher C. Urban (d.o.b. 7/15/91).

That evening, Marty took from Marlow's unlocked gun cabinet a loaded .22 caliber rifle. The gun accidentally discharged and struck another child who was in Marlow's home for the party, Madalyn Brooke Wilson. The child died as a result of the gunshot.

On May 6, 2003, Jones and Urban, individually and on behalf of their minor children who were at Marlow's home,[1] filed a complaint, docket number 12205, against Marlow and the Marlow

[1] Marty was initially included as a minor plaintiff, but his case was non-suited after he reached the age of majority.

Family Limited Partnership ("the Marlow defendants") for negligence and reckless conduct.[2] The complaint included two counts of tortious conduct, one based on negligence and one based on recklessness. The complaint stated:

[COUNT ONE - NEGLIGENCE]

> 15. As a direct and proximate result of Defendants' failure to exercise care in the storage of the firearms and ammunition located within the household, the minor children Plaintiffs . . . each suffered or sustained significant psychological injuries.
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> ***
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> 17. As a result of the negligent conduct of Defendants . . . , the minor children Plaintiffs have sustained actual damages in the way of psychological trauma that has required and will require future psychological and/or psychiatric treatment. Further, the psychological injury to the minor Plaintiffs is likely to result in permanent impairment.

[COUNT TWO - RECKLESS CONDUCT]

> 19. Additionally/alternatively, Plaintiffs maintain that as a direct and proximate result of Defendants' reckless and wanton failure to safely secure the firearms and ammunition present within the home so that these dangerous instrumentalities would not be accessible to minor children, such as the Plaintiffs, each minor Plaintiff sustained serious emotional injuries for which treatment has been sought and for which future treatment will be necessary. Further, the minor Plaintiffs maintain that the reckless and wanton omissions of the Defendants in failing to secure the firearms and ammunition is the proximate cause of each of the minor children's likely permanent psychological impairment as well.
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> 20. Additionally/alternatively, the adult Plaintiffs, DEDRA F. JONES and RUSSELL J. URBAN, maintain that the reckless and wanton omissions of the Defendants as manifested in the failure to safely secure the firearms and ammunition present in the home, is the proximate cause of the loss of their children's comfort, aid, society, and companionship.

Thus, the Plaintiffs alleged that the Marlow defendants failed to appropriately store and secure the firearms in Marlow's home, and that the failure to do so was negligent and/or reckless. The only damages alleged in the complaint related to emotional or psychological injury. On September 29, 2003, Crystal T. Udovich ("Udovich"), an adult who was also at Marlow's home at the time of the incident, filed a similar complaint, docket number 12309, against the Marlow defendants for psychological and emotional injuries sustained from witnessing the shooting and participating in the

[2]The complaint also asserted a loss of consortium claim on behalf of Jones and Urban.

first-aid efforts administered to Madalyn Brooke Wilson.[3] The two actions were consolidated by agreement on June 13, 2005.[4]

On May 10, 2006, the Marlow defendants filed a motion to dismiss or, alternatively, for summary judgment on Plaintiffs' claims for negligent or intentional infliction of emotional distress and for punitive damages. The motion averred that (a) none of the Plaintiffs sustained any physical injury; (b) all of the Plaintiffs were outside the "zone of danger;" and (c) none of the Plaintiffs were related to the deceased child.

On June 9, 2006, the trial court entered an order granting the Marlow defendants' motion, dismissing the Plaintiffs' claims of negligent and intentional infliction of emotional distress and their claim for punitive damages. The order stated:

> IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED as follows:
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> 1. That the claims of the Plaintiffs which includes a count for negligent infliction of emotional distress be, and the same is hereby dismissed, with full prejudice to the refiling of same.
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> 2. That the claim of the Plaintiffs for intentional infliction of emotional distress be, and the same is hereby dismissed, with full prejudice to the refiling of same.
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> 3. That the claim or count of the Plaintiffs for punitive damages against the Defendants be, and the same is hereby dismissed, with full prejudice to the refiling of same.
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> ALL OTHER MATTERS ARE RESERVED FOR FURTHER DETERMINATION BY THE COURT.

The order indicates that the grant of summary judgment on these claims was based on the consent of the parties, noting a "lack of objection appearing from counsel for the Plaintiffs . . . ." The record reflects that the Plaintiffs agreed to the entry of the order.

Several months later, on October 6, 2006, the Marlow defendants filed a motion to dismiss asserting that, inasmuch as the claims for negligent and intentional infliction of emotional distress had been dismissed, and there being no other causes of action set out in the complaint, the entire litigation should be dismissed. The Plaintiffs filed a response, asserting that the motion to dismiss did not comply with the requirements of Rule 12.02(6) of the Tennessee Rules of Civil Procedure, and that matters outside the four corners of the complaint could not be considered for purposes of adjudicating the motion.

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[3] Udovich's husband, Roger K. Udovich, joined in the original complaint, asserting a claim for loss of consortium. He is not a participant in this appeal.

[4] Jones, Urban, the minor children they represent, and Udovich is referred to collectively as "Plaintiffs."

On October 23, 2006, the trial court heard arguments from counsel regarding the Marlow defendants' motion to dismiss. On November 16, 2006, the trial court entered an order granting the motion. The trial court found that "all claims of negligence against the Defendants in these actions were dismissed in the Order dismissing the claims for negligent infliction of emotional distress against the Defendants entered on June 9, 2006, and therefore these causes should be dismissed." The Plaintiffs now appeal.

On appeal, Plaintiffs argue that the trial court erred in granting the motion to dismiss the case because the motion was untimely, as it was not filed prior to the filing of the answers,[5] and because matters outside the complaint should not have been considered in adjudicating a motion to dismiss under Rule 12.02(6). They contend that a Rule 12.02(6) motion tests only the sufficiency of the complaint, without regard to the strength of the evidence. Furthermore, they claim, although the claims for negligent and intentional infliction of emotional distress have been dismissed, there still remains a claim for common-law negligence.

Ordinarily, we review a dismissal for failure to state a claim by taking all of the allegations of fact in the plaintiff's complaint as true and determining whether the allegations set out a viable claim for relief. ***See Stein v. Davidson Hotel Co.***, 945 S.W.2d 714, 716 (Tenn. 1997). The motion filed by the Marlow defendants, however, is not a typical Rule 12.02(6) motion for dismissal, testing the sufficiency of the complaint. Rather, their motion was based on the assertion that the effect of the June 9, 2006 order was to dispose of all matters raised in the complaints, and that a dismissal of the remainder of the lawsuit was proper because no claim remained for adjudication. Despite the Plaintiffs' protestations, there was nothing improper about the trial court's consideration of the motion to dismiss at that juncture. Indeed, the trial court had to determine if there was anything left to try. Therefore, we go on to consider the substantive issue on appeal, namely, whether the trial court erred in granting the motion.

The question of whether the trial court erred in granting the motion to dismiss on this basis is a question of law, which we review *de novo*, affording no deference to the trial court's decision. ***See State v. Levandowski***, 955 S.W.2d 603, 604 (Tenn. 1997).

As we noted above, the Plaintiffs' complaints enumerated two bases for relief titled "negligence" and "reckless conduct," both based on the Marlow Defendants' alleged failure to appropriately store and secure firearms in the home. None of the Plaintiffs were physically injured in the shooting at Marlow's home, and the Plaintiffs' complaints do not allege any physical injury. Rather, the Plaintiffs alleged that the Marlow Defendants' negligence and/or recklessness caused them to suffer emotional and psychological harm. The Plaintiffs characterize these claims as being based on "ordinary negligence." They essentially argue that, although their claims for negligent and reckless infliction of emotional distress were dismissed, there remains a claim for ordinary negligence, for which the damages suffered were serious emotional and psychological injuries.

[5]The answer of Jones and Urban was filed on August 11, 2003, and the answer of Udovich was filed on November 6, 2003.

Therefore, the issue is whether, given the dismissal of the Plaintiffs' claims for negligent and reckless infliction of emotional distress, a simple common-law negligence claim remains for adjudication.[6]

To examine whether the Plaintiffs' common-law negligence claim differs from the claim for negligent infliction of emotional distress, it is helpful to look at how negligent infliction of emotional distress came to be recognized as a tort. From an historical perspective, "the law has been slow to accept the interest in peace of mind as entitled to independent legal protection . . . ." W. PROSSER, LAW OF TORTS, 49 (Jesse H. Choper et al. eds., 4th ed. 1971). The earliest cases afforded no remedy for mental injury, unless the claim was brought within the scope of an otherwise recognized tort such as assault or battery or false imprisonment. ***Id***. at 49-50; ***see Miller v. Wilbanks***, 8 S.W.3d 607, 610 (Tenn. 1999). The reluctance to redress mental injuries apparently stemmed from (1) the difficulty in proving and measuring such intangible consequences, and (2) the fear that legal protection of mental interest would lead to a flood of claims, including fictitious ones, stemming from relatively trivial incidents. PROSSER, *supra*, at 50-51.

Gradually, courts began recognizing a freestanding cause of action for recovering damages for emotional injuries under certain circumstances. This tort was labeled "outrageous conduct" or "intentional infliction of emotional distress." ***Id.*** at 56. Tennessee recognized this cause of action in ***Medlin v. Allied Inv. Co.***, 398 S.W.2d 270 (Tenn. 1966). Recovery was limited to cases involving either intentional or reckless conduct which was "atrocious and utterly intolerable in a civilized society;" mere negligence was not sufficient. ***Medlin***, 398 S.W.2d at 274; ***Miller***, 8 S.W.3d at 614. To guard against trivial or fictitious claims, additional conditions or "elements" were required. For example, some courts required physical manifestation of the mental disturbance, or expert medical proof of a serious mental injury. PROSSER, *supra*, at 59; ***Miller***, 8 S.W.3d at 612-15. In cases involving emotional injury resulting from an act directed at a third person, some courts held that the plaintiff had to be present at the time of the defendant's act, or that the act had to be directed at a member of the plaintiff's immediately family. ***See*** PROSSER, *supra*, at 61.

Courts were slower still to permit recovery for mental and emotional injuries resulting from negligence, as opposed to intentional or reckless conduct. ***Id.*** at 327. In cases involving mere negligence, the danger of vexatious suits and fictitious claims loomed "as an even larger obstacle." PROSSER, *supra*, at 328. Tennessee permitted recovery for negligent infliction of emotional distress only in certain circumstances. ***See, e.g., Laxton v. Orkin***, 639 S.W.2d 431 (Tenn. 1982) (permitting recovery for negligent infliction of emotional distress caused by the ingestion of polluted water); ***Bowers v. Colonial Stages Interstate Transit, Inc.***, 43 S.W.2d 497, 497-98 (Tenn. 1931) (noting that recovery for negligent infliction of mental anguish has been limited to "telegraph and telephone cases").

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[6] "Reckless" conduct is sufficient to state a claim for intentional infliction of emotional distress. ***See Bain v. Wells***, 936 S.W.2d 618, 622 (Tenn. 1997); ***Oates v. Chattanooga Pub. Co.***, 205 S.W.3d 418, 428 (Tenn. Ct. App. 2006). The trial court granted summary judgment on the claim for relief based on reckless or intentional conduct, and this finding is not challenged on appeal. The Plaintiffs assert only that they are entitled to pursue a claim based on ordinary negligence.

In ***Camper v. Minor***, 915 S.W.2d 437 (Tenn. 1996), the Tennessee Supreme Court directly addressed the tension caused by balancing "two opposing objectives: first, promoting the underlying purpose of negligence law – that of compensating persons who have sustained emotional injuries attributable to the wrongful conduct of others; and second, avoiding the trivial or fraudulent claims that have been thought to be inevitable due to the subjective nature of these injuries." ***Camper***, 915 S.W.2d at 440. The ***Camper*** Court reviewed the various devices employed by courts to limit recovery to meritorious cases. These included the physical impact rule, that is, holding that a plaintiff could "not recover for emotional injuries unless he or she suffered an actual physical impact or contemporaneous physical injury caused by the defendant's negligence." ***Id.*** Another approach was the "zone of danger" doctrine, whereby a plaintiff could recover for "emotional distress if, as a result of the defendant's negligence, the plaintiff either suffered a physical injury or was placed in immediate danger of physical harm and contemporaneously feared for his or her own safety." ***Id.*** at 442. In cases in which the plaintiff suffered emotional injury resulting from witnessing the death or injury of a third person, some courts also required that "the bystander-plaintiff must have had a 'close relationship' with the injured or deceased person." ***Id.*** at 444.

After reviewing the benefits and detriments of the various approaches, the ***Camper*** court rejected the "physical manifestation" or "injury" rule as "rigid and overly formulaic." It held that claims of negligent infliction of emotional distress should be analyzed under a general negligence approach, stating that a plaintiff alleging only emotional injuries "must present material evidence as to each of the five elements of general negligence – duty, breach of duty, injury or loss, causation in fact, and proximate, or legal, cause – in order to avoid summary judgment." ***Id.*** at 446 (citations omitted). To guard against trivial or fraudulent actions, recovery was limited to claims involving "serious" or "severe" emotional injury which were supported by expert proof. ***Id.*** Thus, while the ***Camper*** Court discussed additional requirements designed to weed out trivial or fraudulent claims, the Court made it clear that negligent infliction of emotional distress is, in essence, common-law negligence.

In the instant case, the Marlow Defendants' motion to dismiss noted that none of the Plaintiffs sustained a physical injury, all were outside the "zone of danger," and none were related to the deceased child. As discussed above, these factors stem from requirements added by courts because of the suspicion with which courts have historically regarded claims for purely emotional injuries. As made clear in ***Camper v. Minor***, these additional elements do not change the fact that a claim of "negligent infliction of emotional distress" is essentially a claim of negligence which results in emotional distress. Therefore, the trial court's grant of summary judgment on the Plaintiffs' claims for negligent infliction of emotional distress was effectively a dismissal of any claims of ordinary negligence in which the Plaintiffs sought to recover only for injuries which were emotional or psychological in nature.

Because the complaint does not contain an independent, ordinary negligence claim that is distinguishable from the claim of negligent infliction of emotional distress, we must conclude that all of the claims raised in the Plaintiffs' complaints were effectively dismissed in the June 9, 2006

summary judgment order and there was nothing left to adjudicate. Accordingly, we find no error in the trial court's final order dismissing the case as a whole.

The decision of the trial court is affirmed. Costs on appeal are taxed to Appellants Dedra F. Jones, individually and on behalf of her daughter, Amanda K. Jones-Ervin, and daughter Sierra C. Crew; Russell J. Urban, individually and on behalf of his son, Christopher C. Urban; and Crystal T. Udovich, and their sureties, for which execution may issue, if necessary.

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HOLLY M. KIRBY, JUDGE